

2012 WL 2345230 (Mass.App.Ct.) (Appellate Brief)  
Appeals Court Of Massachusetts.

Egidio FERRARA, Plaintiff-Appellant,  
v.  
Olga FERRARA and Dalmazio Ferrara, Defendants-Appellees.

No. 12-P-574.  
2012.

On Appeal from the Middlesex Probate and Family Court  
Docket Nos.: 2002P5491EP1, 05E0104GCI and 06E0150GCI

**Brief of Appellant Egidio Ferrara**

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**\*1 SUMMARY OF ARGUMENT**

I. THE MOTION JUDGE SHOULD NOT HAVE GRANTED THE DEFENDANT OLGA'S MOTION FOR SUMMARY JUDGMENT AND THE MOTION TO DISMISS OR AWARDED c.231 § 6 F counsel fees.

They were relevant material facts in dispute set out in the plaintiff's opposition papers and affidavits, showing that Olga Ferrara (Olga) had lied to the court in her prior divorce, falsely claiming alimony A 61-63; kept plaintiff away from their **elderly** and frail father, by cutting off phone access, later filing **abuse** complaints and firing their father's companion and caretaker, after she called to tell plaintiff that Olga was going through decedent's papers and statements and plaintiff demanded that Olga put them back. A 69 Pgs 1-9. Decedent was diagnosed with a history of **Alzheimer's disease**. A 71-2 Olga also had the pictures of plaintiff's children, grandchildren removed A 24. After, fishing through decedent's papers, Olga went to decedent's lawyer to find out what was in will. Olga was in need money, as she had been unable to work and had been on public assistance and had been facing eviction. A 69-3. She benefited by having an new will where plaintiff and his children were disinherited and in having a trust, where she was the trustee. Since decedent did not speak and write English-but Italian, Olga went with him to a lawyer, who did not speak or understand Italian, for the subject will and trust and acted **\*2** as the sole translator. A 50 Olga later had their other brother arrested and charged with **abuse**, to keep him away, merely because, at the decedent's direction, in her presence said his father wanted some information. A 59. This is the type of case where credibility is a central issue for a fact finder and does come under a frivolous and meritless c.231 6F award type case, especially, before dismissing the cases, without any further hearing, the judge stated: "I've read everything ahead of time . but I don't see this case getting dismissed." A 120, 125

II. THE MOTION JUDGE WAS IN ERROR IN GRANTING OLGA' S MOTION TO DISMISS AND LATER DISMISS WITH PREJUDICE WITH PREJUDICE

Olga had been timely served with process. A-2. However, the return was not in the court papers, but was found and submitted, after the Motion to Dismiss was granted without prejudice. Even, if there was no timely service, here the case went on for some four years, with discovery, conciliation, pre-trial conferences, and setting down for trial before filing the motion to dismiss which was granted without prejudice. A new complaint was soon filed which, sua sponte, was dismissed with prejudice and no hearing.

### III THE MOTION JUDGE WAS IN ERROR IN GRANTING OLGA'S MOTION TO STRIKE PLAINTIFF'S OPPOSITION PAPERS TO SUMMARY JUDGMENT

Plaintiff's submitted papers and affidavit were based on relevant evidence, declarations made by Olga, which were not hear say. Plaintiff's own observations of his father and what \*3 his father told him, contemporaneously, all as shown in his submitted affidavits, and documents with his opposition papers A 18-68 and statement of undisputed facts A 69 pgs 1-9

### IV. IT WAS ERROR FOR THE MOTION JUDGE TO DENY PLAINTIFF'S MOTION TO STRIKE ATTORNEY CONNOR'S AFFIDAVIT.

Olga testified that she paid Attorney O'Connor's firm \$40,000.00 A 60 At a "family meeting" plaintiff contended by affidavit the attorney was one-sided, "not looking at the facts not properly protecting his father" A 16-18, wrote a critical letter to her, immediately after and well before suit. A 17-18. and he pointed out that the attorney's affidavit was based in part on opinion and expert conclusions, that affiant did not check out that the decedent had a history of [Alzheimer's disease](#). That that there was no competent translation made to affiant, who spoke no Italian, hence, no basis for the affidavit.

### STATEMENT OF THE CASE

Plaintiff-Appellant, Egidio Ferrara("Egidio"), appeals from the decisions of the motion Judge granting (1) the defendant Olga Ferrara ("Olga")'s motion for summary judgment and allowance of counsel fees; (2) granting Olga's motion to strike Egidio's opposition papers, denying Egidio's motion to strike Attorney Kathleen M. O'Connor affidavit and; (3) granting Olga's motion to dismiss the equity petitions. All of these matters are inter twined.

On September 6, 2000, the parties' father, Michele Ferrara, \*4 made his third will and a trust that cut off the appellant. Unaware of the new will and original trust, in August of 2000, Egidio filed for guardianship of his father; and the citation was issued on September 18, 2000. Service was made on his father on September 28, 2000. This was the first time decedent and appellants were aware of the guardianship petition. Olga next obtained Attorney Kathleen O'Connor and her firm to oppose the guardianship.

Michele Ferrara died on August 3, 2002. A voluntary executrix petition was filed by Olga, dated 9/10/02, stating the personal property of decedent was less than \$15,000.00 Appendix ("A")-1.

In 2002, Egidio filed an objection to the will petition.

On August 15,2005, Egidio filed an Equity Complaint against Olga. Olga Ferrara claiming the third and last will the "Ferrara Realty Trust," were both the product of undue influence, fraud. It was docketed as 05EO5E104GC1. Timely service of the complaint, summons and notice of hearing was made upon Olga.

Four years later, on 7/28/09, Olga filed a motion for summary judgment and a motion to dismiss - based upon no return of service in the file - even though Olga was timely served A-2 In his opposition, Egidio asserted service was made, no affirmative defense had been claimed, and the case proceeded for some four years, before this motion was filed. In opposing summary judgment, Egidio also moved strike the affidavit of Olga's prior counsel. Olga next filed to \*5 strike Egidio's summary judgment opposition papers.

On 10/1/2009, the court granted Olga's motion for summary judgment, denied Egidio's motion to strike, granted Olga's motion to strike Egidio's opposition papers, and granted the motion to dismiss - which was without prejudice. No reasons or findings were made by the court summarily granting the motion for summary judgment, the striking of Egidio' s opposition papers, denial of Egidio' s motion to strike the affidavit, and grant of the motion to dismiss.

A year later, Olga filed a motion for counsel fees. Egidio filed a motion to reconsider the grant of the motion to dismiss based on prior counsel's a copy finding the return of service. Counsel fees were allowed on June 23 2011 - then based on an Order and Findings.

### STATEMENT OF FACTS AND BACKGROUND

Egidio's Affidavit in opposition to summary judgment, based upon personal belief, A 3-18, stated in the following paragraphs:

1. (He was) one of four children of( decedent). \* \* \*

6at the time (his) father came to the United States settled in Waltham spoke almost no English could not read and write in English. (His) mother also had a limited understanding of English could not really read and write in English.

7. Up until the time of his death in 2002, (his) father spoke very little English and could not read and write in English.

8. (His) father was employed in the construction industry, until his retirement and (his) mother was employed as seamstress

13. after (his) mother died in 1988, a Maria Dentino started cleaning his (father's) house, cooking, shopping for him, \*6 (his father) became very fond of her and she lived with him for several years as his companion until she was forced out by Olga sometime around March of 2000, after (Olga)had taken control of (his) father's affairs and began shutting (Egidio) away from him. (Egidio) understand (s) that when Maria Dentino was forced out of his) father' s house by Olga After Maria Dentino had been forced out of (his) father's life, (his) father started crying because he did not know why she was no longer in his house.

14. In January of 1996, [some four years before Olga came on the scene] (his) father made and executed as will where he left his house at 2 Lake Share Drive, Plymouth to (Egidio) and(his) brother, Dalmazio Ferrara equally. (His father) left his 107-109 Irving Street, Waltham home to Egidio... Dalmazio and Olga in one-fourth shares with the remaining one-fourth share to the children of (their) deceased sister, Irma Mastropieri. The rest of the estate he left (His) father appointed Egidio as his Executor and Temporary Executor.

15. Olga has a history of criminal assault and larceny. \* \* \*

18. upon (his) father's release from the hospital in late January of 2000, Olga moved in house and began taking over his affairs and was in control of his many medications. A-18

19 Olga began a series of eventually cutting off my being able to speak with (his) father over the phone and to be able to see him in his own home. When (Egidio) was allowed to go the house, (he) noticed that the pictures of him and his wife and his children - who are my father' grandchildren were no longer visible. (Egidio) asked Olga what happened and she could not give (him) a believable explanation as to why they (the pictures) were no longer there.

20. On February 7, 2000, around 1:30 a.m., (he) received a call from Maria Dentino, (his) father's housekeeper and companion (who is now deceased), and she told (Egidio) she was very upset to have found Olga around 1 a.m. or so going through all of (his) father's records.

22. Later around 7: 30 a.m., (Egidio) attempted to call my father to find out what was going on and there was no answer. (Egidio) kept calling for 45 minutes and because there was no answer or busy signal, concluded that the phones had been disconnected.

23. Later on, when (Egidio) was able to speak to Olga, (he) \*7 questioned Olga about this and she merely stated that Maria was incorrect, she was merely cleaning the kitchen cabinets - and not going through financial records.

24. The next day, (Egidio) visited (his) father and found him to be confused... (Egidio) noticed that not only had the furniture been re-arranged but that (his) children's pictures had been removed.

25. Over the next three days, (Egidio) attempted to call (his) father and could not get through and the answering machine would come on and say "leave a message."

26. On February 13, (Egidio) began to worry about (his) father and went to the house. Shortly after the police showed up because (his) sister had called the police. The police then told (Egidio) he should not visit alone because (his) sister would call them and who knows what she would say.

27. Several days after that, Egidio again visited my father, Olga was not there. (His) father then told (him) that Olga was pressuring him to make a new will.

28. On February 22, 2000, Attorney Mercuri called (Egidio) to say that he received a call from Olga telling him that my father wanted to change his will. (Egidio) told Attorney Mercuri that due his medications, (his) father did not have full capacity and that (his) father had stated to him that he already had a will. [FN<sup>1</sup>]

29. Later, when Egidio would question Olga about... father and his finances, she would get mad and become unreasonable.

30. (Egidio) then began to suspect that Olga was not handling... father's finances and was in the process of obtaining his \*8 funds and, finally, Egidio contacted the Waltham Police Department to complain about her treatment to (his) father.

31. This complaint resulted in Olga then filing a complaint against Egidio) and having... father sign a complaint. \* \* \*

33. Later, Olga sought to keep (their) brother Dalmazio from seeing our father and filed an **abuse** complaint against him. and with the ouster of his companion, Maria Dentino, was able to gain complete control over every aspect of (his) father's life, including control over his medications.

34. Earlier in May of 2000, along with (his) son, (Egidio) attempted to see his) father. Olga would not let (them) in. (He) then went to the Waltham Police to see if they could do something.

35. (Egidio) later called the Suburban **Elderly** Services regarding my father's treatment and they sent someone to check on (his) father, without(Egidio) being there. Since (his) father could not speak or understand English, Olga acted as the translator.

36. In June of 2000, when (Olga) was not around or sleeping, (he) was able to speak with (his) father and he told (Egidio) Olga was pressuring him not to speak to (him) or (his) children.

37. On July 26, 2000, to celebrate father's 87th birthday, (Egidio's) family were to take him out for dinner. However, (his) father said we had better not because Olga gave him a hard time and would be mad if he went out to dinner with us.

38. In August of 2000, when (he) was able to get through to (his) father, because Olga had forgot to unplug the phone or was asleep, (his) father would answer the phone in a very soft voice and asked me to bring his "chiacchierone" (a chatterbox) Adam-who was decedent's 7 year old grandson.

39. On August 19, 2000, Egidio stopped by with Adam to see...father. Olga then confronted (them) by screaming and using vulgarity - which scared (his) 7 year old son.

42. much later, in 2002, when Attorney Kathleen O'Connor and Attorney Brisk began to represent my father, (they) had several meetings. (Egidio) was concerned about their representation of (his) father and the control of Olga and faxed \*9 a letter to her and a subsequent letter. \* \*

45. (Olga later) fil[ed] **abuse** complaint against (Dalmazio) [FN<sup>2</sup>]

47. On January 13, 2002 (his) father was again in the hospital (he) went to visit. told (Egidio) Olga was stealing money and he wanted a different lawyer who was Olga's lawyer and that lawyer did not listen to him.

49. On January 21, 2002... father again in the hospital (he) went to see him... noticed **bruises on his arms** and legs.

50. On January 25, 2002, (his) brother and (Egidio) went to West Suburban **Elder** Services to file a Complaint against Olga.

See AFFIDAVIT OF EGIDIO FERRARA, A3-18, for the foregoing.

Depositions were taken of Olga, Attorney Francesco Mercuri, who had prepared earlier wills for the decedent, and of Attorney Michael Greene - who did not speak or understand Italian - along with Egidio's obtaining of a court order to obtain Olga's criminal records.

Based upon the foregoing depositions, the court obtained criminal records and history, the pleadings, attached exhibits, including the consultation report from Waltham Hospital with Past Medical History that decedent had **Alzheimer's disease**, A 71,72, along with additional Affidavits from Olga's prior husband, Anthony Pine, A61-63, and Patrick J. Manzo, A 64-68; Egidio submitted his counter statement of undisputed facts in opposition to summary judgment, A-69, pgs 1-8, and memo in his opposition to summary judgment, A 19-68, which set forth, inter alia, the following: \*10 *Affidavit of Anthony Pino-Olga's Former Husband*, A61-63, which set forth, upon personal knowledge, the following paragraphs: \* \* \*

2. (He) was married to Olga Ferrara.

3. for ten (10) years.

4. (He) filed for divorce against Olga (in) Middlesex County in 1993 and (they) were divorced on January 9, 1996.

5. That Olga had a problem with drug addiction.

6. That Olga stole money from (him) from the household accounts, from (his construction company and from payroll deposits.

7. That Olga inflicted violent physical **abuse** and mental **abuse** upon (him).

8. That Olga received several criminal complaints from the Waltham court for larceny and other matters, for which (he) would bail her out.

9. That Olga was subject to mood changes, several times during a day and would then become uncontrollably violent.

11. That she physically damaged the house we had built, after it was sold, causing some \$30,000.00 in damage.

13. That while she was collecting alimony from (him), she later married and did not tell the court or myself and continued to collect alimony from (him), resulting in vacation of alimony and my being awarded a judgment in the approximate amount of \$26,000.00.

14. That in 1995, Olga claimed she was unable to work because of her medical condition and collected welfare and had eviction proceedings commenced against her for non-payment of rent.

*Affidavit of Patrick J. Manzo,*

In his affidavit, A 64-68, Patrick J. Manzo, appointed by the district court, in an **abuse** case filed by Olga to contact Olga to \*11 make arrangements for Egidio meet with his father, stated:

After making two phone calls to Olga and the decedent... These phone calls were placed as I was driving toward (the father's home)... and I continued to drive... to see if I could observe anyone at the house.

After observing that there were two vehicles in the driveway, I placed a third phone call from outside the property I was able to speak with Olga Lord Ferrara. I explained the court order she immediately became defiant. Again in a defiant tone stated 'if this goes any further she would call the police on Egidio' (The next day) I called to set up an appointment for Egidio to see his father I left this request on the answering machine with my phone number where I could be reached To date, I have yet to be reached.

Egidio's Statement of Undisputed Facts:

In his Statement of Undisputed Facts, A 69 pages 1 through 8, Egidio set forth, the following:

That In March of 1995, by Affidavit Agreement, Olga, agreed to vacate her foreclosed home... and safeguard the property (in the meanwhile, but destroyed the property, as shown in a suit brought against her in the Middlesex Superior court action, 95-2939 by Drs. Kervork and Adelia Vorperian. A 69 pgs 1-2

That in 1995, Olga befriended an older women, who was living alone, moved in with her, started taking care of her, and later attempted to isolate her from her mother, started using her credit card resulting in a charge of credit card larceny, as shown by the probation record, produced per court order, A 69 pg 2 and A 38,39

That in September of 1999, Olga was arrested by the Attleboro Police Department on the charges of larceny and malicious destruction \*12 of property, a warrant for the same was outstanding, at the that Egidio complained to the Waltham police she was **abusing** their father, the police found the warrant still outstanding and arrested her, where she said: "I can't believe that Ed would do this," that Egidio was taking money from their father. A 69 pg3 ¶11 and A 69 pgs 7,8 ¶¶ 44,45

That in 1998, on Olga's behalf, a report was made to the Middlesex Family Court, in connection with her divorce suit, that she had been under treatment for depression, had been hospitalized for an overdose. A 69 pg 3 and A-70-70c. In that divorce action, Olga filed for a continuance stating she was unable to work due to her her medical condition,, was subject to eviction and was the receiving public welfare. A 69-3. Later, her former husband sought to cut-off her alimony because of her fraud, when she had remarried. After hearing, Olga was ordered to pay back the alimony funds. A 69 pg 3 and Affidavit of her husband A 61-63.

That three months after she moved into her father's house, she turned Maria Dentino, her father's long time companion and caretaker, out of the house A 69 pg 4. Later had their brother Dalmazio arrested for **abuse**, because he merely asked about his father's documents. A 69 pg 4 and Affidavit of Dalmazio A 57

That when the subject will and trust were done, decedent, along with Olga met with attorney Greene, who did not speak Italian, and Olga translated for her father. Deposition Attorney Greene A50

\*13 That in September of 2000, their father had severe heart problems, **tumor in his kidney**, a missing lung, COPD and was showing Signs of **dementia**. A 69. In 2004, he was diagnosed by the Waltham hospital with **Alzheimer's disease**. A 70 a-c. And,

indeed, Olga told the Waltham Police her father was suffering from Alzheimer's disease. Alzheimer's Disease was noted by Waltham Hospital records. (FN <sup>3</sup>.)

Egidio's Counter Statement of Undisputed Facts, A 69 pgs 7 through 9, also stated the following paragraphs:

43. Sometime after Olga took over the care of decedent upon his release from the hospital in February of 2000, all of the pictures of the children of Egidio, who were the grandchildren of the decedent - that had been prominently displayed in decedent's home had been removed, taken-down, and/or hidden.

45. The Waltham Police filed a report with West Suburban **Elder** Services regarding financial **abuse** from both parties - Olga and Egidio and the police office was not able to communicate with the decedent "due to his lack of English language (speaks Italian)."

47. Sometime in January or 2002, Attorney Kathleen O'Connor then of the Law Offices of William J. Brink had been engaged to represent the decedent.

48. At her deposition, Olga testified, at that time, some of the funds of her father's accounts were used to pay that law firm "close to 40,000.00 or more." (Dep pgs53-54) See A-5

49. In two of the meetings with Attorney O'Connor Olga, Egidio, the other brother - Dalmazio, the decedent, and a translator were all present.

**\*14** 50. Disagreements arose between Egidio and Attorney O'Connor, memorialized by Egidio's letter to her, dated February 20, 2002, whereby Egidio expressed his concerns that she did not listen to his or his brother's concerns and that there was an atmosphere of finger pointing - rather than resolution. That she did not want to listen to his and his brother's concerns about Olga's past and present history of criminal behavior along with her physical and mental instability and that she seemed to be working on Olga's behalf, rather than on their father's behalf. Copies of letters were part of his Affidavit.

52. In addition, Egidio was quite concerned and upset that Attorney O'Connor and Olga were in the process of placing his father in a nursing home.

53. That the translator used by Attorney O'Connor had specifically related that his father had requested an audit of Olga's handling of his financing.

54. Despite decedent's request for such audit, Attorney O'Connor had not taken any steps in this regard.

55. By prior fax of February 7, 2002 to Attorney O'Connor, Egidio stated at the prior meeting with the interpreter present, his father had requested that Egidio conduct an audit of his finances and that "his Trust/Will be changed to read that *all* of his children" share equally. See A 69 pgs 7 through 9.

The record also contained Egidio's February 22, 2000 letter to Attorney Mercuri, who had called him that day to say that Olga and Dalmazio had been in to see him inquiring about their father's will, where Egidio related the following which had taken place over the past two weeks to that letter informing him that Olga calls the police when he tries to see his father, has been trying to drive a wedge between him and his father, that the housekeeper called (two weeks earlier) at 2:00 a.m. to advise that Olga was going through his father's papers, and he spoke with Olga, at that time, telling her **\*15** to put things back. The next day, Olga told him that their father should change his will, and when he next spoke to his father his father told him the Olga and their brother were trying to convince him to change, his will and were accusing Egidio of taking his assets.



The following week, he found that his children's pictures were taken from the fireplace mantle and his father again said he was being pressured to change his will. A 13-15 These statements were made at a time contemporaneous with the events and well-before the subject will and trust.

Next, Olga moved to strike Egidio's affidavit. No hearing was had on this motion and Egidio's affidavit, or with the other affidavits submitted with Egidio's statement of undisputed Facts. Egidio's statement of undisputed Facts was summarily stuck without any reasoning.

The depositions, along with the affidavits and court order documents showed not only were there material facts in dispute, based on personal knowledge and/or otherwise admissible, as declarations against interest, showing plan, motive and/or design, and declarations made by deceased, under reliable circumstances.

Additionally, the affidavit of Attorney O'Connor, A 78-82, submitted by Olga in her motion for summary judgment was placed in issue.

In his request to strike attorney O'Connor's affidavit in support \*16 of Olga's motion for summary judgment A 83-89, Egidio put forth that the attorney's Affidavit was not made upon her personal knowledge, rather, that she posited her affidavit upon opinion of the facts and based on a review of documents and a translator. Egidio contended that no mention was made in her affidavit as to whom she really represented and whether or not she sided with Olga, especially where Olga testified that she paid the attorney's firm \$40,000.00, A-60 ,in this matter, and disregarded the statements and facts presented by Egidio or his brother. Or, whether or not she was adversarial to Egidio and/or his brother.

Further, no mention was made of the fact that Egidio wrote to her in February of 2002, A 17-18,complaining about her actions or inactions. Stating that he contacted the office of **elderly** affairs. And that while the affiant references that she checked with **Elderly** Affairs, no mention is made of the larceny arrest of Olga in the reports sent to **Elderly** Affairs or that Egidio complained of financial **abuse** by Olga of the decedent and of Olga's preventing of Egidio seeing or talking with his father before the new will was executed, despite the fact that Egidio had been taking care of his father's needs and financial affairs for some ten years or that Olga did not sufficient funds of her own. Also, that no reference was made that Olga set up the will changes and sat in the will change discussions. Certainly, the credibility of the affiant should have been presented before a \*17 fact finder, not taken as material facts beyond dispute. The affidavit was in part self-serving. Again, there was no finding or stated basis as to why the motion judge denied Egidio's Motion to Strike, at the grant and entry of summary judgment.

At the pre-trial conference, the Court indicated that it was inclined not to dismiss, but would re-read the papers. A 118-26

Based on the record, at that time, there should have been sufficient showing that based on relevant and admissible evidence there were material issues in dispute.

On October 9, 2009, the equity petitions were dismissed with prejudice. A timely notice of appeal was filed along with a motion to reconsider. The motion for reconsideration was not acted upon.

Later that October, 2009, following the dismissal, a third equity petition was filed, well-within the one year period for re-filing, after a dismissal without prejudice.

On December, 2010, Olga filed a motion to dismiss the equity petition filed after the dismissal without prejudice, to which Egidio filed his opposition and memorandum.

On January 29,2011 the equity petitions were dismissed with Prejudice. And a timely notice of appeal was filed.



Six months later, on June 23, 2011, the court, acting upon Olga's application for attorney fees and costs, entered an Order, findings and conclusions of law on the application for attorney fees and \*18 costs pursuant to G.L. c. 231 § 6F and awarded Olga's lawyers the total sum of \$78,202.80, in her Order, Findings of Fact and Conclusions of Law on the application for attorney fees and costs pursuant to G.L. c.231 §6F and awarded Olga's lawyers the total sum of \$78,202.80, in her Order, Findings of Fact and Conclusions of law. See A 127-36

### **ISSUES PRESENTED AND ARGUED**

I. WHETHER OR NOT THE MOTION JUDGE SHOULD HAVE GRANTED THE DEFENDANT OLGA'S MOTION FOR SUMMARY JUDGMENT AND THE MOTION TO DISMISS THE WILL CASE AND GRANTED SUMMARY JUDGMENT AND DISMISSAL OF THE WILL CASE WITHOUT ANY FINDINGS OR EXPLICATION OF REASONS OR BASIS FOR THE GRANT OF SUMMARY JUDGMENT, AT THAT TIME, AND, ALMOST TWO YEARS LATER, THE COURT ALLOWED COUNSEL FEES AND THEN MADE FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO c.231 §6F ON THE SUBSEQUENT REQUEST FOR ATTORNEY FEES.

II. WHETHER OR NOT THE MOTION JUDGE SHOULD HAVE GRANTED THE DEFENDANT OLGA'S MOTION TO DISMISS AND AFTER GRANTING THE MOTION TO DISMISS WITHOUT PREJUDICE, SHOULD HAVE THEN DISMISSED THE PLAINTIFF'S NEWLY FILED COMPLAINT.

III. WHETHER OR NOT THE MOTION JUDGE SHOULD NOT HAVE GRANTED THE DEFENDANT'S MOTION TO STRIKE THE PLAINTIFF'S OPPOSITION PAPERS TO SUMMARY JUDGMENT

IV. WHETHER OR NOT THE MOTION JUDGE SHOULD NOT HAVE DENIED THE PLAINTIFF'S MOTION TO STRIKE THE AFFIDAVIT OF ATTORNEY KATHLEEN M. O'CONNOR, PRESENTED BY THE DEFENDANT IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT.

### **ARGUMENTS AND REASONING**

**I. WHETHER OR NOT THE MOTION JUDGE SHOULD HAVE GRANTED THE DEFENDANT OLGA'S MOTION FOR SUMMARY JUDGMENT AND THE MOTION TO DISMISS THE WILL CASE AND GRANTED SUMMARY JUDGMENT AND DISMISSAL OF THE WILL CASE WITHOUT ANY FINDINGS OR EXPLICATION OF REASONS OR BASIS FOR THE GRANT OF SUMMARY JUDGMENT, AT THAT TIME, AND, ALMOST TWO YEARS LATER, THE COURT ALLOWED COUNSEL FEES AND THEN MADE FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO c.231 §6F ON THE SUBSEQUENT REQUEST FOR ATTORNEY FEES.**

\*19 ANSWER: The motion judge should not have granted Olga's Motion for Summary Judgment, where motive, intent, and state of mind are credible and central issues. And the findings of fact and conclusions of law on counsel fees, almost two years later were in error.

#### **A. Standard for Summary Judgment**

Rule 56 (c) of the Domestic Rules of Procedure provides that summary judgment shall be granted only where there are no genuine issues of material fact in dispute and where the record, upon which the motion for summary judgment is posited, entitles the moving party to judgment as a matter of law. See e.g. *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983) (citations omitted);

“The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the reviewing party, all material facts have been established and the moving party is entitled to judgment as a matter of law.” *Greater Lawrence Sanitary Dist. v. North Andover*, 439 Mass. 16, 20-12 (2003). And, “[f]rom the same record as the motion judge, the reviewing court examines the allowance of summary judgment de novo”. *Chi-Sang Poon v. Massachusetts Institute of Technology*, 74 Mass. App. Ct. 189, 194 (2009) And that the reviewing court “assess[es] the factual information in the light most favorable to the nonmoving or opposing party and then determine whether the record resolves \*20 the material questions of fact and the issues of law in favor of the movant.”

However, “[i]n cases where motive, intent, or other state of mind questions are at issue, summary judgment is often inappropriate.” *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991) citing *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989).

It is appellant's position that Summary Judgment does lie in this case, especially where credibility is at issue and many of the material facts are in dispute. Olga and her brother had much to gain in changing the will and Olga had the mot to gain when the Trust was created. She was translated for her father to counsel in the making of the changes. A 51 She kept Egidio away from he father, sought to undermine Egidio and contacted the police to have **abuse** petitions filed to keep him away from his father. And, later, when Dalmazio], in response to his father asking for documents, in his father's presence, Olga not only refused to respond, bit called the police and had Dalmazio arrested for domestic **abuse**. A 57 Olga Shut off the phone to keep Egidio for reaching his father, and even sought to keep Mr. Manzo out of the picture. Mr. Manzo had been directed to make arrangements for Egidio to visit with his father. See A 65-68.

Here, “[m]uch depends on the credibility of witnesses testifying as to their own state of mind. In these circumstances, the jury should be given an opportunity to observe the demeanor, \*21 during direct and cross examination”. *Flesner*, 410 Mass at 809. Hence, this is a cardinal type of case for a fact finder.

## B. Why Defendant is not Entitled to Summary Judgment

The affidavits and depositions in this matter establish that there are a number of substantial and material facts in dispute. There are issues as to the motive, intent and state of mind of Olga and the stat of mind of the decedent, while under her care and complete control. And, thus, the positions of the parties as to what happened are at opposite ends, which only a fact finder may determine.

Here, “where the proper disposition of the motion for summary judgment depends upon the admissibility of evidence and admissibility, depends, in turn, upon resolution of questions of fact, the judge's decision should reflect that he or she has confronted and resolved these questions.” *Thorell v. ADAP, Inc.*, 58 Mass App. Ct. 334, 340, 789 N.E. 2d 1086 (2003) Here, that was not done. And, “if upon reviewing the summary judgment decision we cannot fairly assume that this was not done, we must vacate the order granting summary judgment See *Nally v. Volkswagon of Am., Inc.*, 191, 298-190 (1989).” *Id.*

Here, we have a material dispute as to the question of undue influence, control, untoward conduct, and overreaching on the part of Olga, who arrived on the scene in January of 2000, moved into her father's house, terminated his father's long-standing caretaker and \*22 companion, started shutting off access to Egidio's father by first not answering the phone or making excuses as to why the decedent could not come to the phone, and then by seeking restraining orders from the court against Egidio. A 4-9 These are facts clearly within the personal observation, knowledge, and experience of appellant. Additionally, Olga's statements and responses to Egidio do not fall within the hearsay exception.

Olga has a history of larceny complaints and assault against her. The last one, of those obtained via court order, was well-within the five year period and would go to the issue of motive and intent.

Furthermore, Olga lied to the court in the prior divorce action in an attempt to gain alimony, while she had remarried - resulting in a judgment against her for some \$26,000.00 for wrongful obtaining of alimony. A 61-63 This is part of the court records in the earlier Massachusetts divorce proceeding between Olga and her ex-spouse, Antonio Pino. This would be relevant to establish Olga's conduct, credibility and what she would blatantly lie to a court in claiming monies she was not entitled to. See e.g. affidavit of Olga's husband. A-61-63. Her former husband's affidavit, likewise, should not have been stricken as hearsay. Those facts go to motive and intent, credibility, as based upon reliable court evidence.

Here, Olga had a lot to gain from her father's estate, especially in having the Waltham property placed in trust for her to the \*23 exclusion of Egidio. Also, soon after moving in and going through her father's records, A 20, she takes it upon herself to have her father execute a new will in March of 2000, increasing her stakes in her father's estate. Not being satisfied, she has her father make out a new third will less than six months later, in September of 2000-along with the trust, where she and their father are Trustee and she is the sole beneficiary of the Waltham realty, with the Plymouth realty going to Dalmazio. Both the Will and the Trust are the subject of this contest.

These are substantially undisputed material facts which give rise to undue influence. See *Germain v. Girard*, 72 Mass. App. Ct. 409, 412-413 (2008).

Here, the record is clear, and submitted by Egidio, as part of his opposition to summary judgment, that Olga and Dalmazio both substantially benefit from the third will and the realty trust; and That case law establishes that there is a presumption of undue influence where "the fiduciary who benefits in a transaction with the person for whom he is a fiduciary." In the Matter of the Estate of Moretti, 69 Mass. App. Ct. 642, 643 (2007) (citing *Cleary v. Cleary*, 427 Mass. 286, at 295 [1998]).

It is beyond cavil that Olga is a fiduciary trustee by virtue of the September 2000 Trust. In addition, Olga is occupied a fiduciary relationship "from the nature of the parties' \*24 interactions." See *Germain v. Girard*, 72 Mass. App. Ct. 409, 412-413 (2008) (citing *Cleary*, supra).

Here, Egidio's Affidavit, based on personal knowledge and experience presents that Olga had complete control over her father, whom, according to the pleadings, depositions, and medical records that their father was in dementia and had *Alzheimer's Disease*. That their father had a long-time relationship with his companion, She took steps, early on to eliminate her father's long-time companion and care-taker, from the scene in order to complete her sphere of undue influence. See ¶¶ 20-22 of Egidio's Affidavit. A 6

Olga took control of decedent's finances and oversaw his drug administrations.

Here, Olga undertook to eliminate her brother Egidio, first by denying not only him, but Egidio's seven year old son from having access to decedent, even to the point of removing all photos of Egidio and his family from decedent's home. A 24 Olga went so far as to file and threaten to file **abuse** complaints against Egidio, and, later, even filed an **abuse** complaint against her other brother Dalmazio merely because Dalmazio had the temerity to say their father - the decedent - wanted to see some documents. A 59

Moreover, to make sure that there was no independent witness to speak the decedent the day the subject will and trust were \*25 executed, Olga refused to allow the court appointed Mr. Manzo see her father or allow him to come to the phone and made threats, against him. A65 Mr. Manzo was appointed by the court in that matter and had a duty to make a report. That report was not hearsay, was reliable and was probative on the issue of summary judgment.

Furthermore, Olga was no stranger to the courts, Olga has a history of larceny complaints and assault against others. Olga lied to the court in an attempt to gain alimony, when she was married to another and kept this hidden from her prior husband and the court, resulting in a judgment against her for some \$26,000.00 for wrongful obtaining of alimony. A 65-67 This is probative, reliable, and admissible evidence that goes to credibility, motive, plan, intent, and fabrication. Its probative value outweighs prejudice.

The affidavit from Olga's prior husband, Anthony Pine, to whom she had been married for 10 years, at the time of their 1996 divorced, details that Olga had a problem with drug addiction, stole money from their household accounts and from his company and from his payroll deposits, along with inflicting mental and physical **abuse**. That Olga was subject to mood changes, several times during the day and would become violent. That she had own son arrested and preyed on the **elderly**. The court obtained criminal complaints establish that Olga was in need of money and took advantage of the **elderly**. These facts are salient to this case and to the \*26 issue of Olga's position as a fiduciary, as well as a beneficiary.

Under the facts present in this case, Olga as “the fiduciary who benefits... bears the burden of establishing that the transactions did not violate [her] obligations.” See *Cleary, Moretti and Germain*, all *supra*.

Here, the four elements of undue influence are present and as iterated in *Germain*, at 414:

“Four considerations are usually present in a case of undue influence: ‘that an (1) unnatural disposition has been made (2) by a person susceptible to undue influence to the advantage of someone (3) with an opportunity to exercise undue influence and (4) who in fact has used that opportunity to procure the contested disposition through improper means.’ ” *O'Rourke v. Hunter*, 446 Mass.814, 828 (2006), quoting from *Tetrault v. Mahoney, Hawkes & Goldings*, 425 Mass. 455, 464 (1997). There was evidence in the record that would enable a rational trier of fact to find that each of the four considerations was present.”

In light of the presented affidavits and the pleadings, this is not a case where Olga has presented the required absence of a triable issue. Indeed, Olga has not presented any evidence to overcome the “presumption of undue influence,” required under the triad of *Cleary, Moretti, and Germain*.

Furthermore, Olga and her actions are subject to “strict scrutiny” where she was, as stated in *Moretti* “a fiduciary who not only control[ed] finances, but also serve[d] as the sole gatekeeper for an **elderly** and dependent individual, by answering all phone calls screening all visitors.” *Id.* at 652. The record established \*27 that Olga “served as the sole gatekeeper for (her father) an **elderly** and dependent individual by answering all phone calls... and screening all visitors (especially the appellant,” but sought the use of the police and the courts to effectuate screening.

Here, where “strict scrutiny” is required along with the presumption of undue influence that Olga has the burden to meet and overcome.

Egidio's affidavit, A-1, establishes a well-planned scheme on the part of Olga to keep Egidio away from his father, whom he took care of, to isolate the decedent, to prevent Egidio from taking his father out to dinner with his family, to instill fear into the decedent, to terminate the decedent's house keeper and companion and to even deprive the decedent of seeing his 7 year old grandson, all for her financial gain to the detriment of the Appellant. This is the type of evidence that is reliable and admissible under *Germain* 72 Mass. App. Ct at 414. This is not the type of case that is grist for summary judgment, rather, this is a case requiring fact-finder determination. It is not a summary judgment case, based on the conflicting evidence and the records establish that this is not the type of case,” [w]here a moving party properly asserts that there is no genuine issue of material fact, (it is the type of case where) the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded \*28 jury could return a verdict for the [non-moving party] on the evidence presented.” *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991),

Olga, as the moving party has failed to meet her burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles Olga, as moving party, to Rule 56 judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, at 16-17 (1989).

*Dismissal of the Will Case*

Egidio filed his objection to the will, the case went on for conciliation, discovery, pre-trials etc. The will and equity cases were consolidated by agreement. Several years later, Olga filed a Petition to file a photo-copy of the subject will in lieu of the original will. Egidio filed a statement of objections, A 73-77, and sometimes used the word “I believe” instead of “I know” or words to that effect. No motion to strike was made for almost four years.

With the summary judgment papers, Egidio's affidavit set forth reasons, base on personal knowledge why the will and trust were the product of undue influence, breach of fiduciary duty etc., along with statement of undisputed facts. Egidio's affidavit should also have served a statement of objections, in these consolidated cases.

Rule 16 (a) of the Rules of Probate Court states:

(a) if any person who has filed an appearance... on a petition of a will fails to file a written objection to the petition, \*29 stating specific facts upon which the objection is based the court may... order the appearance struck.

The rule is not jurisdictional or absolute, it is discretionary. See *O'Rourke v. Hunter*, 446 Mass.814, 817 (2006), which said: Under section (a) of Rule 16, each party contesting a will must file an affidavit of objections 'stating specific facts and grounds upon which the objection is based' Under Rule 16(b) the proponent of the will may move to strike each contestant's affidavit of objections on the ground that it does not comply with rule 16 (a), that is that it fails to state 'specific facts and grounds'. If a judge agrees and strikes every affidavit of objection in its entirety, and the petition is otherwise in order, the will may proceed to probate.

The facts submitted by Egidio were not vague or general, but were specific. Furthermore, the will case could not be read in a vacuum, separate and apart from the equity case, where the cases had been consolidated and Egidio's affidavit should have been read in paria materia with the will objection affidavit.

Further, for the reasons set forth, supra, under Raposa, Olga is deemed to have waived any right to file an untimely and tardy motion to strike. It was not timely raised.

Later, after the court indicated that it was not going to grant the motion dismiss and was not going to summary judgment, A 125. However, without any hearing, anon, the court simply dismissed the will case and equity case without rationale or findings. Motions to reconsider were filed and not acted upon.

#### *As to Award of Counsel fees*

Olga's present attorney filed for attorney Fees and costs \*30 for his firm and for prior counsel, Attorney Peter A. Bella, seeking \$52,738.14 for his firm and \$37,683.82 for prior counsel for a total of \$90,466.96 pursuant to M.G.L. c. 231 §6F.

M. G.L. c 231 §6F permits a court to assess reasonable legal costs and fees against a party *only* when all or substantially all of its claims or defenses are wholly insubstantial, and not advanced in good faith. See *Lewis v. Emerson*, 391 Mass. 517, 525-26 (1984). (section 6F focuses on the conduct of the litigation, not on conduct prior thereto). Awards of legal fees pursuant to §6F “should be reserved for rare and egregious cases.” *Police Commissioner of Boston v. Gows*, 429 Mass. 14,18 (1999). See also, *Masterpiece Kitchen & Bath, Inc. v. Gordon*, 425 Mass. 325, 328-9 (1997) ( section 6F is a punitive measure that is meant to discourage insubstantial actions and defenses). It is important to note that legal fee awards under 6F is allowed in rare cases to prevent 6F from becoming an “indirect method of supplanting the usual rule that taxable costs are deemed full compensation for the expenses of litigation.” *Massachusetts Adventure Travel, Inc. v. Mason*, 27 Mass. App Ct. 293, 299 n.8 (1989). *What is a Frivolous Claim?*

“Frivolous” is defined, in part, as “of little weight or importance: having no basis in law or fact.” A claim is frivolous only if there is an “absence of legal or factual basis for the claim.” *Demoulas Super Mkts v. Ryan*, 70 Mass. App Ct. 259, 267 (2007).

\*31 Under the holding of Lewis, supra, 319 Mass at 526, a claim is frivolous if it “without even a colorable basis in law.” Here, as shown, there is both a legal and factual basis for plaintiff’s claims.

In addition, there is a second prong required under 6F for an award of legal fees based on frivolous, which requires a showing by the moving party that the “claims were not advanced in good faith.” *Hahn v. Planning Bd of Stoughton*, 403 Mass.323, 327 (1988), and Should not be used as a “chilling effect” to deter seeking redress. *What is Good Faith?* The allowance of attorney fees in this type of case will certainly have a chilling effect on most probate cases.

Assuming that form over substance, so to speak, also falls within the ambit of c 231 §6F, nonetheless, as to both form and/or substance the additional requirement of the statute is to prove a lack of good faith.

The lack of “good faith” required under 6F implies an “absence of malice, an absence of design to defraud or to seek an unconscionable advantage.” See e.g. *Hahn v. Planning Bd of Stoughton*, 403 Mass.323,

Here, taking the facts as presented by the plaintiff-appellant, in the light most favorable to appellant, the facts show a scheme and pattern of conduct on the part of Olga to not only control their father, but to deny access of the plaintiff, and later of appellee Dalmazio access to their father, by wrongfully using the police to ensure that Egidio is kept away from his father.

\*32 This scheme is first seen by Olga’s putting her father’s companion and caretaker out of the way, by immediately firing her.

Almost two years after the grant of summary judgment, the trial judge, in her later findings of fact on the application for attorney fees ruled that decedent “believed that Egidio went through his personal effects and threatened to have his live-in companion vacate his home.” A- 128 ¶4. This finding, however, does not square with the requirements for summary judgment - it is purely fact finding, which may satisfy a trial finding - but it does not satisfy a summary judgment finding, because. here we have diametrically opposite and disputed relevant evidence in Egidio’s affidavit. A 18-68, based on personal knowledge and Olga’s declarations against interest, to wit:

13....after (his) mother died in 1988, a Maria Dentino started cleaning his (father’s) house,... cooking, shopping for him, (his father) became very fond of her and she lived with him for several years as his companion until she was forced out by Olga sometime around March of 2000, after (Olga) had taken control of (his) father’s affairs and began shutting (Egidio) away from him. (Egidio) understand (s) that when Maria Dentino was forced out of (his) father’s house by Olga... After Maria Dentino had been forced out of (his) father’s life, (his) father started crying because he did not know why she was no longer in his house. And, upon taking over the household, rummages through their father’s papers in order to ascertain his will and holdings. Olga contacts the attorneys to prepare new wills and then a trust, all the while acting as an interpreter, with the intent to deprive appellant and his children of their rights to inheritance, for her own benefit.

20. On February 7, 2000, around 1:30 a.m., I received a call from Maria Dentino, (his) father’s housekeeper and companion (who is now deceased), and she told (Egidio) she was very upset \*33 to have found Olga around 1 a.m. or so going through all of my father’s records. (This is also corroborated by Egidio’s prior letter, Exhibit “A” to Attorney Mercurio of February 22, 2000 - well before suit, and within three weeks of the incident.)

22. Later around 7:30 a.m., (Egidio) attempted to call my father to find out what was going on and there was no answer. (Egidio) kept calling for 45 minutes and because there was no answer or busy signal, concluded that the phones had been disconnected.

23. Later on, when (Egidio) was able to speak to Olga, (he) questioned Olga about this and she merely stated that Maria was incorrect, she was merely cleaning the kitchen cabinets - and not going through financial records.



24. The next day, (Egidio) visited (his) father and found him to be confused... (Egidio) noticed that not only had the furniture been re-arranged but that (his) children's pictures had been removed.

25. Over the next three days,(Egidio) attempted to call (his)father and could not get through and the answering machine would come on and say "leave a message."

26. On February 13, (Egidio) began to worry about (his) father and went to the house. Shortly after the police showed up because (his) sister had called the police. The police then told (Egidio) he should not visit alone because (his) sister would call them and who knows what she would say.

27. Several days after that, Egidio again visited my father, Olga was not there. (His) father then told (him) that Olga was pressuring him to make a new will.

28. On February 22, 2000, Attorney Mercuri called (Egidio) to say that he received a call from Olga telling him that my father wanted to change his will. (Egidio) told Attorney Mercuri that due his medications, (his) father did not have full capacity and that (his) father had stated to him that he already had a will. [Egidio wrote that day to Attorney Mercuri in this regard, which was also part of the record A 12-15]

**\*34** 29. Later, when Egidio would question Olga about...father and finances, she would get mad and become unreasonable. [FN<sup>4</sup>]

Moreover, in addition, there is more than a colorable claim under case law that Olga was a fiduciary trustee by virtue of the September 2006 Trust. Here, Olga occupies a fiduciary relationship "from the nature of the parties' interactions." See *Germain v. Girard*, 72 Mass. App. Ct. 409, 412-413 (2008) (citing Cleary, *supra*,).

Withal, under the facts present in this case and case law, Olga as "the fiduciary who benefits...bears the burden of establishing that the transactions did not violate [her] obligations. See *Cleary, Moretti and Germain*, all *supra*.

Also, this is a case that falls under the objective-subjective "good faith" prong under the teaching of *Hahn v. Planning Bd of Stoughton*, 403 Mass. 332, 337 (1988). The record does not support that Petitioner's claims were not advanced in good faith. Especially, in view of *Matter of the Estate of Moretti*, 69 Mass. App. Ct. 642, 643 (2007) (citing *Cleary v. Cleary*, 427 Mass. 286, at 295 [1998]).

Here, it is the Petitioner who is the wronged party and who has been divested of his inheritance, while the Respondent has greatly benefited from this divestiture.

**\*35** Egidio, under the law and facts in the case and reasonable inferences, did not seek "to defraud (or)seek an unconscionable advantage"needed to show a lack of good faith under *Hahn*, *Id* at 1338.

Moreover, under the warnings of *Hahn*, c. 231 §6F should not be used as a "chilling effect." and used as a battering ram to deter parties from seeking redress from the courts. Likewise, the claimed basis for the Motion to Dismiss does bring this case under the requirements of a c. 231 §6F award of counsel fees.

Olga was duly served, A 2,appeared before the court, answered the case, participated in lengthy discovery, and did not claim lack of Service in her Answers. Only after the cases were consolidated and the matter approached trial - some four years later - did Olga file her Motion to Dismiss and concomitant therewith summary judgment on the equity complaint. The equity complaint was dismissed on *procedural* grounds without prejudice. A 115 The last equity complaint, *which was properly filed after the dismissal without prejudice* was then dismissed with prejudice without any basis.



The award of the huge counsel fees, based on the small estate in this case does not pass *statutory muster nor equitable and fair*.

**II. WHETHER OR NOT THE MOTION JUDGE SHOULD HAVE GRANTED THE DEFENDANT OLGA'S MOTION TO DISMISS AND AFTER GRANTING THE MOTION TO DISMISS WITHOUT PREJUDICE, SHOULD HAVE THEN DISMISSED THE PLAINTIFF'S NEWLY FILED COMPLAINT.**

On August 10, 2009, some four years after Egidio filed the equity \*36 complaint with the court on 8/15/05, Olga filed a procedural motion to dismiss the equity complaints Olga's dismissal motion was toed mainly upon the failure (according to the court docket) to have filed a return of service on Olga a copy of the complaint and summons, premised on the failure of the Plaintiff to perfect service of the complaint on the Defendant in a timely manner as required under Domestic P. Rule 4 (j) [ it is the same as [R. Civ. P. 4 \(j\)](#)] which provides:

If a service of the summons and complaint is not made upon a Defendant within 90 days after filing... (and) if good cause is not shown why such service was made within that period, the action shall be dismissed... without prejudice.

Here, it cannot be gainsaid by Olga that she was not served within the 90 day period, as the later-found return of service shows that Olga was, indeed, served within a week of the filing of the Complaint. And, that she had counsel, who moved to continue the injunctive hearing right away, well within the 90 day period. Olga cannot call it “fish and fowl” with the same breath, knowing that she was “in fact” timely served, with a copy of the summons, complaint, and short order of notice on the requested injunctive relief(FN<sup>5</sup>).

[Rule 4 \(j\)](#) should be read with [Rule 4 \(f\)](#), which reads:

Return. The person serving the return shall make proof of Service thereof in writing to the court promptly and in any Event with the period of time during which a person served must respond to service... Failure to make proof of service \*37 does not affect the validity of service.

Here, assuming Olga forgot or overlooked that she was served, there is no issue on this point, as Olga was indeed timely served and Olga obtained counsel almost immediately after service, who entered the case forthwith, had the short order hearing rescheduled, filed response and did not claim lack service, participated in discovery, pre-trial, depositions, joined in a motion to consolidate over four years, and the matter had been set down for trial on a number of occasions, well before the motion to dismiss was filed.

Even had Olga not been properly served: given the fact that some four years have elapsed between the filing of the complaint and this motion, coupled with the facts that Olga was immediately represented by counsel where extensive litigation has taken place, the matter had been set down for trial, and numerous court appearances have been made; Olga, as a matter of law, has waived any defense of insufficiency of service of process under Rule 12 or failure to make timely service under [Rule 4](#), under the rubric of [Raposo v. Evans](#), 71 Mass. App. Ct. 379, 882 N.E.2d 356 (2008).

*Raposa* arose out of an automobile accident, where just short of the three year statute, the plaintiffs filed their complaint. Service was made on Evans, at what was purported to be his last and usual above, along with a mailing of the summons and complaint copies.

In his answer, Evans pleaded the “boilerplate” defenses, which \*38 included “lack of service,” but did not then press a motion to dismiss.

Some two and a half years later, after Evans' counsel was informed of a problem with service, Evans attempted to make service through the registry of motor vehicles, because Evans could not be located. Evans' attorney filed a motion to dismiss for lack of 90 day service, which was denied.

A discovery schedule was later agreed to. Raposa's attorney next sought discovery from Evans, and because of failure of response, filed for default, which was granted on the issue of liability only. The following month, in March of 2006, Evan's counsel filed a second motion to dismiss, which was some 18 months after the denial of his first motion to dismiss. Evan's counsel added that service had been made upon a commercial establishment - not Evans last and usual abode.

The second motion to dismiss was denied because the court concluded that Evans had abandoned the defense of insufficiency of service, despite the fact it had been pleaded in his answer, "by his failure to meaningfully pursue it for more than five years, until the final pre-trial conference and after his participation in discovery and motion practice.' Id. At 382.

The Appeals Court, in looking to the Federal Rule, said "[t]hese courts have held that a failure to move to dismiss within a reasonable time and prior to participating in discovery and litigating the merits of the case constitutes a waiver of the defense." Id. at 383. And:

\*39 We find persuasive the reasoning that requires action within a reasonable time. A defendant who challenges service of process in his answer must move to dismiss within a reasonable time, prior to substantially participating in discovery and litigating the merits of the case. This will save the parties and the courts substantial time, effort, and expense. Here, Evans waived the defense. Although Evans averred in his answer that service was insufficient, he failed to file a motion to dismiss until more than three years after filing his answer. Id at 385.

This case falls well-within the ambit of *Raposa*.

Withal, the motion to dismiss was granted specifically "without prejudice." Hence, when the final Equity Complaint was filed well-within the year of dismissal, there was no basis to dismiss this suit, nor was there any reason not to hear and consider the motion for reconsideration.

Moreover, at the 9/29/09 pre-trial hearing on the Motion to dismiss the equity case and will objection, Olga's Motion for Summary Judgment, and the motion to strike, A 118-126 the court said:  
I've read everything ahead of time (A 120)

unfortunately, as much as I would really love to dismiss cases but I don't see this case getting dismissed. A 125

I will reread everything before I do that, are you ready for a real Pretrial at this point in time. A 125

I will reread everything again so I'll just tell you my thought that certainly does not mean that I'm not going to change my mind A 126

While the judge did certainly change her mind, three weeks later, there were no record findings for this change of mind on the October 9, 2009 dismissal of plaintiff's cases and denial of his motions. \*40 notwithstanding, the volume of materials submitted by the parties, except as what may be gleaned, over a year and a half later, from the award of the later filed motion for counsel fees.

### III. WHETHER OR NOT THE MOTION JUDGE SHOULD NOT HAVE DENIED THE PLAINTIFF'S MOTION TO STRIKE THE AFFIDAVIT OF ATTORNEY KATHLEEN M. O'CONNOR, PRESENTED BY THE DEFENDANT INSUPPORT OF HER MOTION FOR SUMMARY JUDGMENT.

From Olga's own lips, at her deposition, A 59, she stated that she paid attorney O'Connor's law firm "the sum of Forty Thousand (\$40,000.00) dollars" in connection with this case, and, in effect, placed the issues of "self-interest" and "objectivity" of the attorney affiant in the mix. The attorney had been prepared on January 9, 2002. One year later on January 9, 2003, a deposition of the attorney affiant, (90-104) was taken, her affidavit was at the center of her deposition.

The attorney's deposition further corroborates that much of the salient affidavit parts were not first-hand or based on personal knowledge, but were, in the main, hearsay or opinion, for example: Her deposition established that she did not speak Italian, A 91,92), and with her associate, "who speaks fluent Spanish (and that Spanish and Italian were similar enough) her associate and decedent "were able to communicate with each other." A 93 Her associate translated. A 93 That she "didn't believe her associate was guessing at it (A 94). She related that that she also, she had met decedent alone, A 91 As to her affidavit statement, A 78 ¶6, 'which caused Michele a great \*41 deal of stress and embarrassment" that he told his though "gestures and in language," A 95.

As to her affidavit statement, that "Michele uncovered evidence that Egidio engaged in financial and other types of **abuse** of Michele and his Michel's companion" "when he returned from the hospital. A- 95 However, she then relayed that information "about Egidio going through Michele's papers "was conveyed to Egidio[?] by his companion. A 96. "and I don't know whether it was during his hospitalization or after" A 96; that assertion simply does not square with the record facts which shows that Olga was going through her father's papers and that their father's companion, Maria Dentino, called Edigido at that time, 2:00 a.m., to tell him that Olga was going through their father's papers and, soon thereafter, Olga fired their father's long-time companion and caretaker. See page 36, *supra*.

Unfortunately, this, "searching" event, according to Egidio's affidavit, was relayed by companion Maria Dentino, who called Egidio after decedent came home form the hospital and Olga had entered the household, to tell him that Olga was going through his father's papers. When Egidio confronted Olga about this event, Olga had her father's companion fired and removed from the household. See e.g. Egidio's letter to Attorney Mercuri A-13 and Affidavit ¶¶13,20-22, pg 36, *supra*. The attorney's assertion is not personal knowledge, but, rather, it is second hand or totem pole hearsay.

\*42 As to her affidavit that **Elder** Services investigated **abuse** allegations and substantiated them." A 97 However, the deposition, shows this to be thin gruel, because: she did not notify **Elder** Services, A 97, nor did she did not know who notified **Elder** Services. A 98 Furthermore, she had never seen **Elder** Services records, in this regard. A 98 And, while she spoke to someone in **Elder** Services, that person "was not involved in the initial investigation" A 99

Withal, she "believed West Suburban verified there had been some financial misappropriates . " A 99 And as to her statement that Michele "didn't want anything to do with Egidio," in response to the question: *Does your last sentence say anywhere that Michele say this?* Responded: No, it doesn't say that in the last sentence." A 102

Olga's attorney also expressed *her opinion* that "lga was trustworthy and able to take care of her father's financial needs." A 102 Notwithstanding the fact that Olga told her "of her personal background" and related "she had some personal problems of a personal nature." A 102

Her opinion as to Egidio was "that he wasn't capable of caring for his father. Her opinion was that she "didn't think he was honest or really cared about his father's best interest." A 103

Moreover, she related that she "never reviewed the total of (Michele) finances with (decedent) never had the opportunity to do a complete analysis." A 104.

**\*43** But she did “discuss his finances with Olga, his daughter,” who was “helping her father, at that time with his finances.”

The attorney's affidavit, in light of the submitted evidence and documents cannot be said to be iron-clad and irrefutably establishes that plaintiff had “failed to meet his burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles” Olga, as moving party, to Rule 56 judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, at 16-17 (1989).

Moreover, for the purposes of summary judgment, Attorney O'Connor's Affidavit should have been either stricken or disregarded. *Whitney v. Lynch*, 27 Mass.App. Ct. 498, 500 (1989); *Flesner v. Technical Communications Corp.*, 410 Mass.805,809 (1991) and *Pederson v. Time, Inc.*, 404 Mass.14,17 (1989). Especially, where in Egidio's Affidavit, Egidio states and shows that he wrote two letters to Attorney O'Connor (well before suit was filed), after a “family meeting,” to the extent that she was not properly looking at the facts of this case or protecting his father's interest. A-16-18

Attorney O'Connor's affidavit cannot be said to be that of a objective and percipient witness, based solely on observed fact, whose asseverations are beyond cavil. Indeed, part of the Affidavit is “boot-strapping” and/or ipse dixit presentment.

Here, the affiant was presented as an expert witness, whose **\*44** credibility, knowledge, and understanding of the fact as an open issue and the affidavit should be stricken or disregarded on the issue of summary judgment. In denying Egidio's motion to strike the court should have, at that time, given reasons for consideration and adoption of the affidavit, or afforded some sort of gate-keeping hearing.

Thus, in light of the issue of “self-interest, credibility, and bias, the issue of decedent's state of mind, Olga's alleged venal interest, and mental understanding, there should have been some “gate keeping” by the court before considering whether the attorney's affidavit was proper grist for the summary judgment grist mill or should have been disregarded or set aside as being proper meal for the fact finder. Appellant would contend that in the facts of this case, where the reliability, self-interest, credibility of the affiant is strongly called into issue, and inferentially from the lips of Olga, and from the two letters of Egidio, after the family meeting to the affiant, the trial judge should assess the reliability and credibility of the of that part of the affidavit, which is in the nature of expert evidence. See *Palandjian v. Foster*, 446 Mass. 100, 110-111 (2006).

#### **IV. WHETHER OR NOT THE MOTION JUDGE SHOULD NOT HAVE GRANTED THE DEFENDANT'S MOTION TO STRIKE THE PLAINTIFF' S OPPOSITION PAPERS TO SUMMARY JUDGMENT**

A motion for summary judgment is not a trial, a determination of credibility, nor is it a substitute for a trial. The germane papers **\*45** are those which show or indicate that there are disputed relevant material facts which curtail the moving party from seeking to avoid trial. A trial judge in consideration of the summary judgment motion is to review the “cold record” and determine whether or not in review of the pleadings, depositions, affidavits and documents, without any assessment of credibility, and is in no better position that the appeals court, in this regard.

And “[w]here a moving party properly asserts that there is no genuine issue of material fact, “the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.” (Citation omitted) A judge's mere belief that the movant is more likely to prevail at trial is not a sufficient basis for granting summary judgment...” *Flesner v. Technical Communications Corp.*, 410 Mass.805,809 (1991).

Here, we have record proof of decedent's [Alzheimer's disease](#) not only from the consultation report at Waltham Hospital (A-7), which was was also an exhibit in the deposition of Dr. Reda, but we have Olga stating to the Waltham Police, in the police report, where Olga Complained against Egidio in 2002, that her father was suffering from [Alzheimer's disease](#), which is a progressive disease.

Certainly, as shown in the record, Egidio had a long-standing relationship with his father and had ample opportunity to personally evaluate any mental changes on the part of his father. It cannot be gainsaid, that there is not admissible evidence on this issue.

Here, we have the decedent with a housekeeper-companion since \*46 1989 (who is also deceased), whom his father depends upon and, when upon finding Olga going through her father's documents in the dead of night calls Egidio to relate this, and after Egidio asks Olga about this, she fires her father's companion. This is admissible and relevant evidence, which contradicts Olga's affidavit on this point, as well as that of the attorney, who in relying only upon Olga, makes that issue part of her affidavit. And, at the time of her affidavit, apparently, overlooked the deposition of Dr. Reda and the Waltham Hospital admission report, which shows that decedent had a past history of Alzheimer's, which is a progressive disease.

Here, we have a series of Olga purposefully not only denying Egidio access to his father, but calls the police to insure that she has complete control over the premises. Egidio's statements in this regard are not only based on personal observation, but it is relevant evidence.

Here we have Olga stating that she paid \$40,000.00 to attorney O' Connors firm for this matter an. A 59 We also have Egidio's letters, which criticize attorney O'Connor's asserted failures in connection with taking care of his father and Olga's alleged wrongdoing, contemporaneous with the events and well before this lawsuit. A 16-18

In contrast to his associate, Attorney Brisk's deposition posits that "while he does has "some" passing familiarity with Italian, he cannot "translate legal concepts into Italian" and while he is "fluent \*47 in Spanish," "we had a halting conversation of 'Spatalian', "Spanish and Italian." A 106, and that when "I use the word 'Italian' is not probably correct in this case. He speaks - he spoke a dialect of Italian, not classical Italian. And so it was important to find someone who really had the nuances." A 107 Summary judgment ought not to rise and fall on nuances.

Additionally, while the affidavit states they contacted Dr. Reda, it fails to show any follow-up with the consulting doctor, who was brought in to take care of the decedent, while Dr.Redda was away and, who has a different take on the decedent's mental status. The affidavit is not gospel and raises issues of self-serving statements and credibility. This affidavit is not sufficient to cast aside Egidio's affidavit.

While it may be said that Olga's ex-husband's affidavit, likewise, is not beyond reproach, what is beyond reproach, however, is that a family court judge found that Olga had misrepresented to the court that she was entitled to alimony, when in fact she had, it is a reasonable inference from this evidence that if Olga lied or made misrepresentations to the family court to obtain alimony that she was clearly disqualified for, by hiding the fact of her re marriage, then she would not hesitate to make misrepresentations in order to "feather her nest" of inheritance at the expense of Egidio.

\*48 The affidavit of Mr. Manzo, appointed by the district court to make arrangements for Egidio to see an visit with his father and report back to the court, shows that Olga did not want Egidio to see his father, court or no court and sought to keep the decedent estranged from Egidio.

Moreover, the subject will and trust was drawn by an attorney, who not only did not speak Italian, but took Olga's word, as the translator, of what her father wanted. The later finding by the court on the motion for fees that Egidio filed a guardianship in August of 2000 was of no moment, because citation for the guardianship and its service was made after the will and trust. A137-40. Hence, decedent would not have been aware of this at the time of the last will and trust. On these facts, a fair minded jury may not take Olga at her proof and could find for the plaintiff.

Taking the foregoing papers presented by both sides and without weighing the evidence, coupled with the holding of *Cleary, Germain, Moretti*, it was error to not only strike Egidio's affidavit, but that Olga was not entitled to summary judgment and it was error to do so.

## CONCLUSION

Here the facts and pleadings demonstrate a continuing scheme on the part of Olga to obtain the Irving Street property in Waltham by taking undue advantage of her father, who was unable to read and write English or even understand spoken English and exclude her brother \*49 Egidio from not only her father's bequests - but also from even visiting their father and wrongfully using the court system to use **abuse** complaints to keep Egidio out of the picture.

Olga has a long history of addiction and larceny complaints as well as being **abusive** and subject to violent mood swings. Olga, has no respect for the law and was in dire financial straits. Olga's carefully executed plan to gain complete control over her mentally impaired, physically deteriorating, aged, and frail father to gain his property takes this case out of the ambit of summary judgment and demonstrates a case which should be determined under the crucible of direct examination and cross examination where there are material facts in dispute. Especially where there is a presumption of under influence on the part of Olga and where she has failed to present any sufficient rebuttable evidence to overcome the presumption against her position under Cileary, Moretti and Germain, supra.

The will case, filed in 2002, was wrongfully dismissed without as Olga was not only timely served, she answered the case and did not raise any issue of faulty service, or assert early on that the Egidio's statement of objections was faulty by use the word believe rather than know. This case underwent extensive discovery, conciliation, pre-trials and joined motions to consolidate. It was too late in the game, some four years later, to seek dismissal on procedural grounds.

Moreover, where the court specifically dismissed the earlier \*50 equity case without prejudice, it was clear error to sui sponte dismiss the refilled 2009 equity case and prior cases with prejudice.

The issues in this case are not frivolous or without merit, and, indeed clearly support the appellant's position and contentions.

Moreover, where the motion judge, at the pre-trial conference, after said, I've read everything ahead of time. A 120

unfortunately, as much as I would really love to dismiss cases but I don't see this case getting dismissed. A 125

I will reread everything before I do that, are you ready for a real Pretrial at this point in time. A 125

demonstrates that the case was not frivolous or without basis.

For the foregoing stated reasons, the defendant's motion for summary judgment should be reversed and counsel fees awarded in connection therewith be, likewise, overruled, and that plaintiff be accorded such other additional relief or leave as the circumstances deem mete.

### Footnotes

- 1 That day, Egidio wrote to Attorney Mercuri that Olga calls the police when he tries to see his father, has been trying to drive a wedge between him and his father, that the housekeeper called (two weeks earlier) at 2:00 a.m. that Olga was going through his father's papers, he spoke with Olga, at that time, telling her to put things back. Olga told him that their father should change his will, his father said the Olga and their brother were trying to convince him to change his will and were accusing Egidio of taking his assets. The next week, his children's pictures were taken from the fireplace mantle, his father again said he was being pressured, A 13-15
- 2 At his deposition, excerpts to Summary Judgment, Dalmazio testified "I ask my sister there's some paper (their father) wants me to see and read to him. My sister started to be upset, and she called the police. And I was arrested. Q. So you stopped seeing your father? A. Because I had a restraining order. (Dep pgs 51-52) A 57

- 3 Dr. Reda, at his deposition, was shown the Consultation Report of Dr. Kraus, for an admission of the decedent to the Waltham Hospital where Past Medical History, records “includes: Alzheimer's dementia and impression as 5) Alzheimer's disease. A-70
- 4 Olga's “getting mad and becoming unreasonable” can also be seen from the deposition of Appellee Dalmazio, where Dalmazio testified that merely because his father asked him to ask Olga about some papers and read them to her, Olga had him arrested and obtained a restraining order preventing Dalmazio from seeing his own father. See A-56
- 5 A copy of the timely Return of Service was found by prior counsel for Egidio, after the Motion to Dismiss was granted without prejudice and a Notice of Appeal had been filed and was made part of a Motion for Reconsideration, which has not been acted upon. A 109-10

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